United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7557

IN THE

United States Court of Appeals

For the Second Circuit

ANTHONY PEREZ, JR.,
Plaintiff-Appellant-Appellee,

against

MUHAMMAD ALI,
Defendant and Third-Party Plaintiff-Appellant-Appellee,

against

AMERICAN BROADCASTING COMPANIES, INC.,
Third-Party Defendant-Appellant-Appellee,

and

ABC SPORTS, INC.,
Third-Party Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF AND APPENDIX FOR APPELLANT AMERICAN BROADCASTING COMPANIES, INC. AND APPELLEES AMERICAN BROADCASTING COMPANIES, INC. AND ABC SPORTS, INC.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-7557
76-7572
76-7589

ANTHONY PEREZ, JR.,

Plaintiff-Appellant-Appellee,

-against-

MUHAMMAD ALI,

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-against-

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Third-Party Defendant-Appellant-Appellee,

and

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On Appeal from the United States District Court
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BRIEF AND APPENDIX FOR APPELLANT AMERICAN BROADCASTING COMPANIES, INC., AND FOR APPELLEES AMERICAN BROADCASTING COMPANIES, INC., and ABC SPORTS, INC.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did not the District Court (Judge Pollack) act properly in dismissing the defendant-third-party plaintiff's claims against American Broadcasting Companies, Inc. and ABC Sports, Inc.?

2. Did not the District Court fail to exercise or abuse its discretion in denying third-party defendant American Broadcasting Companies, Inc.'s motion to dismiss without prejudice its two counterclaims against defendant-third-party plaintiff, and by dismissing said counterclaims for failure of proof?

STATEMENT OF THE CASE

Plaintiff Anthony Perez, Jr. commenced this libel action against defendant Muhammad Ali on or about April 15, 1975. The libel claim is based upon comments made by Ali during the course of an interview with Howard Casell broadcast by American Broadcasting Companies, Inc. (hereinafter, "ABC") on March 29, 1975. On April 16, 1975, Perez served a Supreme Court (State of New York, County of New York) summons and libel complaint upon ABC, also based upon the aforementioned Ali comments. An amended complaint (without

substantive change) was served on April 25, 1975 in this State Court action. In the District Court Ali asserted libel and breach of fiduciary and contract counterclaims against Perez, resulting in alleged physical injuries and reputational harm. On July 10, 1975, Ali served a third-party complaint upon ABC and ABC Sports, Inc. (hereinafter, "ABC Sports") wherein he asserted contribution and indemnity claims should he be held liable to Perez. In the reply to these counterclaims, ABC asserted contribution and indemnity claims against Ali should Perez recover in the State Court action. All parties to the aforesaid libel claims in both courts relied primarily on defenses of qualified privileges under the First and Fourteenth Amendments to the U.S. Constitution and the privilege of reply.

The parties to this action then engaged in discovery, including depositions. Third-party defendants' deposition of Perez was upon the stipulation that the transcript could be employed in both this action and the State Court action. At a pre-trial conference on June 1, 1976, Judge Pollack set the matter down for trial starting October 12, 1976. In a joint pre-trial order submitted thereafter, Perez and Ali stipulated that they were each "public figures", making requisite that each

prove libel by the other with clear and convincing evidence of "actual malice".*

In chambers on the morning of October 12, 1976, prior to the selection of the jury, counsel for third-party defendants moved the Court to dismiss the two counterclaims of ABC against Ali without prejudice, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure. This motion was made on the basis that the State Court action had not yet gone to trial, and therefore ABC would not at that time be able to prove either the indemnity claim or the contribution claim against Ali. The attorney for Ali responded that Ali would be prejudiced if ABC's claims against him would not be resolved together with the other issues involved in the Federal Court action. The Court noted that the Rule 41(a)(2) motion had not been made earlier and denied the motion without prejudice to its later renewal. (ABC Appendix at 12-13).**

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*New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964).

**The parties hereto had agreed that the complete trial transcript would be made part of the joint appendix. However, the first 15 pages of the transcript were inadvertently omitted. Those pages are included at the conclusion of this brief and are referenced as the "ABC Appendix". The joint appendix is referred to herein as the "Appendix".

After all parties had rested, ABC renewed its Rule 41(a)(2) motion and the Court reserved decision. (Appendix at 545). The Court dismissed Ali's claim in indemnity against third-party defendants, but refused to dismiss Ali's claim in contribution. (Appendix at 564). Counsel for third-party defendants argued that the latter claim should be dismissed because contribution was unavailable for intentional torts, and that in any event, no evidence had been introduced that third-party defendants had broadcast the Ali interview with "actual malice" - accordingly, Ali and ABC and ABC Sports could not be jointly liable to Perez. (Appendix at 553-59).

The jury returned its verdict against both Perez and Ali on their claims against each other. The Court then dismissed Ali's third-party contribution claim against ABC and ABC Sports, Inc. (Appendix at 674).

During the course of the trial, there was no evidence presented that employees of third-party defendants responsible for the broadcast of the Ali interview had acted with "actual malice". In fact, Perez testified that Howard Cosell, who conducted the interview, had said nothing defamatory about him on the program. (Appendix at 234). Furthermore, there was no evidence presented that third-party defendants had agreed to indemnify Ali for claims arising out of

the broadcast of the interview. Ali only testified that he expected third-party defendants to edit out of the interview whatever was illegal, but he concluded that he would have left in his comments on Perez if it had been his television station. (Appendix at 308). Howard Cosell testified that, to the best of his recollection, Ali had not requested that anything be blacked out of the interview tape. (Appendix at 483).

Third-party defendant ABC did not offer any evidence in support of its two counterclaims in contribution and indemnity against Ali since, as noted above, those counterclaims were predicated on a prior finding of liability to Perez in the State Court action which even at the present time has not gone to trial.

ARGUMENT

Introduction

Our argument can conveniently be summarized as follows:

(1) The Court below correctly dismissed Ali's claim in indemnity against third-party defendants prior to submission of the case to the jury since indemnity is un-

available to a party found liable for an intentional tort and, in any event, no evidence had been presented to establish either an indemnification agreement or vicarious liability by Ali and "actual malice" by third-party defendants.

(2) The Court below correctly dismissed Ali's claim in contribution against third-party defendants since the jury had found that Ali was not liable on the claim by Perez for which contribution was sought. In fact, the Court should have dismissed said third-party claim prior to submission of the case to the jury: a party found liable for an intentional tort cannot receive contribution, and in any event, there was no evidence presented that third-party defendants had acted with "actual malice" (First Amendment defense) or with common law malice (privilege of reply defense).

(3) The Court below failed to exercise or abused its discretion by denying third-party defendant ABC's motion to dismiss without prejudice its counterclaims in contribution and indemnity against Ali pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure and by dismissing said counterclaims for failure of proof since Ali would not have been prejudiced by the granting of said motion other than by the possibility of defending a future action brought by third-party defendant.

POINT I

THE DISTRICT COURT PROPERLY DISMISSED ALI'S THIRD-PARTY CLAIM IN INDEMNITY

A. Indemnity Is Not Available To A Party Found Liable for An Intentional Tort

At the close of all evidence, the Court decided to not submit to the jury Ali's indemnity claims against the third-party defendants. This decision was correct for two reasons: (1) indemnity is not available to a tort-feasor found liable for an intentional tort; and (2) there was no evidence to support a recovery under theories of either implied indemnity or contractual indemnity.

Indemnity, meaning a shifting of the total loss from one party to another, exists either by agreement or is implied by operation of law where the indemnitee is only vicariously liable and the indemnitor is the actual wrong-doer. Rogers v. Dorchester Associates, 32 N.Y.2d 553, 565 n.2, 565-66 (1973). There can be no indemnity, whether contractual or implied, in favor of an intentional or reckless tortfeasor. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51, at 312 (4th ed. 1971), [hereinafter cited as PROSSER]. See RESTATEMENT OF RESTITUTION § 88 (1937) ("A person who has discharged a tort

claim to which he and another were subject . . . (b) is barred from restitution if his tort involved seriously wrongful conduct."; Comment c, at 396 provides that ". . . a person is guilty of seriously wrongful conduct if he acts in reckless disregard of the interests of others . . . . "); Margolin v. New York Life Insurance Company, 32 N.Y.2d 149, 153, 153 n.2 (1973) (suggests no contractual indemnity allowed for willful or gross negligence or for intentional torts); see also Globus v. Law Research Service, Inc., 287 F.Supp. 188, 199 (S.D.N.Y. 1968), aff'd in relevant part and rev'd on other grounds, 418 F.2d 1276, 1287-89 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970) (contractual indemnification not allowed to defendant who violated fraud provisions of the securities laws with actual knowledge of false and misleading statements or omissions and wanton indifference to its obligations and the rights of others, otherwise deterrent effect of securities laws would be reduced).

The reason for the above rule is to preclude indemnity which encourages willful or reckless torts. It sustains as correct the Court's dismissal of Ali's claim prior to submission of the case to the jury since Ali sought indemnity for a possible recovery by Perez for an intentional or reckless act, i.e., that Ali defamed Perez with "actual malice", meaning

knowledge of falsity or reckless disregard for the truth. New York Times Co., supra, 376 U.S., at 280. This is because Perez stipulated in the pretrial order that he was a "public figure", requiring even clear and convincing evidence of Ali's "actual malice". Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (1967).

More broadly, Ali was not entitled to recover under a theory of implied indemnity which is available only to a vicariously-liable tortfeasor. Implied indemnification shifts a loss from a vicarously-liable tortfeasor to the tortfeasor actually responsible for the acts or omissions causing the harm. This is done in order "to prevent a result which is regarded as unjust or unsatisfactory." Rogers, supra, 32 N.Y.2d, at 565 n.2 (quoting Prosser). Therefore, the loss is shifted from an employer to a negligent employee, from the owner of a motor vehicle to a negligent driver, from the owner of a building to an independent contractor exclusively responsible for the maintenance of the building or parts of it, and so on. See Rogers, supra, 32 N.Y.2d, at 565-66.

But a party who is personally responsible for at least part of the harm has no implied right of indemnification.

Rock v. Reed-Prentice, 39 N.Y.2d 34, 38-39 (1976); Bush Terminal Buildings Co. v. Luckenbach Steamship Co., 9 N.Y.2d 426, 430 (1961); LaRosa v. Fuhrmann, 34 A.D.2d 881, 882 (4th Dept. 1970). Even where the relationship between the parties traditionally would call into play the doctrine of vicarious liability, there is no right of implied indemnification if the would-be indemnitee himself in fact participated in the wrongdoing. Thus, a party who by contract has exclusive control of an instrumentality has no implied obligation to indemnify a party who had actual notice of a defect causing injury to a third party.

For instance, in Rogers, supra, plaintiff who was injured by a malfunctioning elevator sued the owner and manager of the building ("the building") and the elevator maintenance company ("Otis"). By written contract with the building, Otis had undertaken exclusive maintenance of the elevator. The building was held liable to plaintiff only because of a non-delegable duty under the Multiple Dwelling Law. Inasmuch as the accident occurred solely because of Otis' negligence, the building's cross-claim in implied indemnity was sustained. However, if the building had had actual notice of the defect and had failed to notify Otis, it would not have been entitled to implied indemnification; the accident would not have been

solely attributable to the acts or omissions of Otis even though by contract Otis had exclusive responsibility for maintenance of the elevator. 32 N.Y.2d, at 562. See Levine v. Shell Oil Co., 28 N.Y.2d 205, 210 (1971) (Shell denied a right of implied indemnification against the tenant operator of one of its gasoline stations since Shell had actual notice of the defective condition which caused the accident and did nothing about it); Brady v. Weiss & Sons, 6 A.D.2d 241, 243-44 (4th Dept. 1958) (landlord and tenant's action against independent contractor for implied indemnification will be sustained if landlord and tenant had only constructive, and not actual, notice of the defective condition).

Consequently, Ali was legally barred from recovering under a theory of implied indemnity; his liability to Perez, for which he sought indemnity, could not have been that of a vicariously-liable tortfeasor: i.e., he had to have been found to have acted with "actual malice" for Perez to have succeeded. For that reason, and since as aforementioned, intentional and reckless tortfeasors cannot recover under theories of either implied or contractual indemnity, the Court below properly dismissed Ali's indemnity claim.

B. There Was No Evidence Supporting Ali's Indemnity Claim.

The Court's dismissal of Ali's indemnity claim was correct also because there was no evidence submitted in support of the claim. There was no evidence submitted to show any agreement, even if permitted by law, whereby third-party defendants undertook to indemnify Ali. It should be noted in this connection that contractual indemnity for just the negligent acts of the indemnitee is allowed only on proof that the contract unequivocally so provides. Margolin, supra, 32 N.Y.2d, at 153; Thompson-Starrett Company v. Otis Elevator Company, 271 N.Y. 36, 41 (1936); Hogeland v. Sibley, Lindsay & Carr, 51 A.D.2d 866 (4th Dept. 1976).

Furthermore, there was no evidence to support an implied indemnity claim that Ali was only a vicarious tortfeasor while third-party defendants were the actual wrongdoers. Ali testified that during the interview Cosell did not egg him on or agitate him to make statements about Perez. (Appendix at 329, 329-30). Perez himself testified that Cosell said nothing defamatory about him during the interview. (Appendix at 234). There was no evidence that the third-party defendants broadcast the interview with "actual malice". See Point II, subsection C, infra.

POINT II

THE DISTRICT COURT PROPERLY DISMISSED ALI'S THIRD-PARTY CLAIM IN CONTRIBUTION

A. Ali's Third-Party Claim In Contribution Was Properly Dismissed After A Jury Verdict Against Perez

The Court below dismissed Ali's third-party claim in indemnity prior to submission of the case to the jury, but dismissed his third-party contribution claim only after the jury had rendered its verdict. Our position is that while the contribution claim was properly dismissed after the verdict, the Court should have dismissed it at the close of the evidence.

The right to contribution or apportionment of a loss between two or more tortfeasors does not arise until the party seeking it has first been held to be liable to the injured party. Dole v. Dow Chemical Co., 30 N.Y.2d 143, 153 (1972) (". . . the instruction would be to consider the third-party plaintiff's cause over only if that party were first found negligent . . . . ") (emphasis added). Since the jury found that Ali was not liable to Perez, the Court properly dismissed Ali's contribution claim against the third-party defendants.

The Court also properly had refused to allow the jury to award Ali contribution from third-party defendants on any punitive damages awarded to Perez. (Appendix at 647) Section 1401 of the New York Civil Practice Law and Rules (CPLR) allows apportionment for damages for ". . . the same personal injury, injury to property or wrongful death". Punitive damages are purely personal and not subject to such allocation. See Raplee v. City of Corning, 6 A.D.2d 230, 233 (4th Dept. 1958). Consequently, a party found liable for contribution must pay only his equitable share of the compensatory damages recovered by the injured party.

B. No Contribution Is Allowed For An Intentional Tort.

As noted in subsection A of Point I, supra, Ali's liability, if any, to Perez had to be based on Ali's "actual malice", i.e., a publication he made with knowledge of falsity or reckless disregard for the truth. Consequently, Ali had no right to contribution from third-party defendants because the common law rule since Merryweather v. Nixan, 101 Eng. Rep. 1337 (K.B. 1799) denies contribution to intentional or willful wrongdoers. PROSSER, supra, § 50, at 305-08. See RESTATEMENT OF RESTITUTION § 88, supra, comment c, at 396 ("reckless disregard of the interests of others" bars con-

tribution or indemnity); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1(c) ("[T]here is no right of contribution in favor of any tortfeasor who has intentionally [wilfully or wantonly] [sic] caused or contributed to the injury or wrongful death.") The policy behind the rule is that ". . . the court will not aid an intentional wrongdoer in a cause of action which is founded on his own wrong". UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 1, comment (c), at 65. Such a rule is particularly to be applied where the party from whom contribution is sought is being sued separately by the injured party and so will not escape a liability for its wrongdoing, if any. Cf. Liggett & Myers Incorporated v. Bloomfield, 380 F.Supp. 1044, 1046 (S.D.N.Y. 1974); Alexander & Baldwin, Inc. v. Peat, Marwick, Mitchell & Co., 385 F.Supp. 230, 238 (S.D.N.Y. 1974). As noted earlier, third-party defendant ABC is still subject in the State Court action to a libel claim by Perez arising out of the Ali's interview remarks.

The common law rule of Merryweather v. Nixan, supra, against allowing contribution to intentional tortfeasors was expanded by American courts to disallow contribution to parties who had been "actively" (or "affirmatively") negligent. See PROSSER, § 50, supra, at 306; Note, Toward a

Workable Rule of Contribution in the Federal Courts, 65 COLUM. L. REV. 123, 124 (1965). Dole modified the common law by eliminating the rule that an "actively" negligent tortfeasor would be denied contribution. Dole also eliminated the precondition for contribution that a joint money judgment have been entered against the tortfeasors and the limitation to pro rata share contribution. A new Article 14 of the New York Civil Practice Law and Rules (CPLR), effective September 1, 1974, codified Dole.

But neither Dole nor the new Article 14 of the CPLR abrogated the basic common law rule against allowing contribution to intentional wrongdoers. The New York Court of Appeals has not applied Dole or Article 14 to other than negligent cases. No New York cases decided in courts of appellate jurisdiction have been found which apply Dole or Article 14 to intentional torts. One New York lower court has held that Article 14 applies to an action for fraud, Primoff v. Duell, 85 Misc.2d 1047, 1051 (Sup.Ct. N.Y.Co. 1976), and another lower court decided that Dole did not apply to intentional tortfeasors, Goswami v. H. & D. Construction Company, 78 Misc.2d 99 (Sup.Ct. Steuben Co. 1974) (action for trespass). A Southern District judge held that at the pleading stage there was no reason to disallow cross-

claims seeking contribution for fraud liability, particularly where the claims set up an active/passive tortfeasor relationship viable even before the Dole decision. Slotkin v. Brookdale Hospital Center, 377 F.Supp. 275, 279-80 (S.D.N.Y. 1974).

Until a New York court of appellate jurisdiction decides otherwise, Dole and Article 14 should not be considered to have overruled the common law rule, for which there is the logical basis of deterrence for conscious wrongdoing. See 7B McKINNEY'S CONSOLIDATED LAWS OF NEW YORK 3019:70, at 296-97 (Siegel commentary) [hereinafter cited as McKINNEY'S] See also Royal Indemnity Co. v. Aetna Casualty & Surety Co., 193 Neb. 752, 229 N.W.2d 183 (1975) (allow contribution among negligent tortfeasors but continue rule against contribution among intentional tortfeasors). At least, Dole and Article 14 should not be applied to intentional torts other than where the party seeking contribution was acting in a passive or secondary role. See Slotkin, supra, 7B McKINNEY'S 3019:70, at 25 (1976 Supp., Siegel commentary).

Since Ali sought contribution for liability of an intentional nature, i.e., his own "actual malice" toward Perez based on the comments he made regarding Perez, the Court below should properly have dismissed Ali's claim as a matter of law before the case went to the jury.

C. There Was No Evidence To Support Ali's Contribution Claim

Even if Ali's contribution claim were proper, it would first have to be shown that third-party defendants are subject to liability to plaintiff. CPLR § 1401. In other words, contribution could be allowed only upon clear and convincing evidence that each of the third-party defendants' employees responsible for the alleged defamatory publication made the broadcast of the alleged libel with "actual malice" and that ABC and ABC Sports did not enjoy a complete privilege of reply defense.

This point is illustrated by cases decided subsequently to Dole. For instance, in Barry v. Niagara Frontier Transit System, Inc., 35 N.Y.2d 629 (1974), plaintiff injured while alighting from a bus sued the owner and operator of the bus ("NFT"). Her action against the Village for failure to repair a street curb and sidewalk, etc. had been dismissed because no prior notice of the defect had been given to the Village as required by section 341-a of the Village Law. Defendant NFT's third-party action for contribution against the Village was dismissed on the same basis, and the Court of Appeal's affirmance noted that "[t]o say that a third-party apportionment action may be brought

against the village would permit indirectly what could not be done directly by the plaintiffs themselves . . ." 35 N.Y.2d, at 633, and furthermore "[t]o permit a Dole claim to go forward in the absence of notice would undermine the legislative design to restrict the village's liability for nonfeasance . . . " 35 N.Y.2d, at 634.

See Holodook v. Spencer, 36 N.Y.2d 35, 51 (1974) (injured infant sues negligent driver who impleads infant's mother for apportionment based on negligent failure to supervise child; since the court held that the plaintiff child did not have such a cause of action against his mother, it dismissed the third-party plaintiff's action).

In the Court below, there was no evidence at all that any employees of third-party defendants acted with "actual malice" in broadcasting the Ali interview. What was required was ". . . clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." Gertz, supra, 418 U.S., at 342. This means clear and convincing proof that the employees of third-party defendants responsible for the broadcast ". . . in fact entertained serious doubts as to the truth of [the] publication." St. Amant v. Thompson, 390 U.S. 727, 730-31 (1968).

As had been noted above, Perez testified that Howard Cosell, the employee of ABC who interviewed Ali, said nothing defamatory about Perez on the program. (Appendix at 234). More importantly, there was no evidence that third-party defendants' employees broadcast the Ali interview with knowledge of the falsity of or with reckless disregard for the truth of Ali's comments about Perez. In the absence of such evidence, we submit that the Court should not have submitted Ali's contribution claim to the jury. Additionally, and despite the District Court's refusal to charge that the ABC defendants also enjoyed as the media a privilege of reply defense identical to that accorded Ali (exception to charge, Appendix at 658), the trial record clearly supports such a defense and affords no evidence against said defendants of common law malice sufficient to defease the privilege. (Appendix at 234). Shenkman v. O'Malley, 2 A.D.2d 567, 574-77 (1st Dept. 1956) (publication of a defamation is protected by a qualified privilege of reply if it is a reply to a prior defamation, is "pertinent" to the initial charge, and is not "excessive"); Preston v. Hobbs, 161 App. Div. 363, 365 (1st Dept. 1914) (the publisher through whose medium the speaker makes his reply is protected by the speaker's privilege); Josephson v. New York World-Telegram Corporation, 179 Misc. 786, 786-87

(Sup.Ct. N.Y.Co. 1942) (same); RESTATEMENT (SECOND) OF TORTS § 612 (Tentative Draft No. 21, 1975).

The conclusions reached in Points I and II of this brief indicate that even if this Court should send the case back for retrial of Perez's libel claim against Ali, the dismissal of Ali's third-party claims in indemnity and contribution should not be reversed. That is, even if the Court below had committed errors in instructing the jury or in its treatment of Perez or his counsel such as to warrant reversal, Ali's claims in indemnity and contribution would still remain deficient at law and without the requisite evidence for submission to the jury.

POINT III

THE DISTRICT COURT FAILED TO EXERCISE OR ABUSED ITS DISCRETION BY DENYING ABC'S RULE 41(a)(2) MOTION AND BY DISMISSING ABC'S COUNTERCLAIMS FOR FAILURE OF PROOF

Prior to the selection of the jury, counsel for third-party defendant ABC made a motion to the trial court seeking dismissal without prejudice of ABC's two counterclaims against Ali pursuant to FED. R. CIV. P. 41(a)(2). (ABC Appendix at 2-3). The stated reason for the motion was that those counterclaims in indemnity and contribution were predicated upon the outcome of the State Court libel action brought by Perez against ABC. Since that action had not, and to the present date has not, proceeded to trial, ABC could not prove damage to support its claim of contribution or indemnity. The Court then heard Ali's counsel argue that the granting of the motion would prejudice Ali by the possibility of a second action brought against him by ABC. The Court inquired as to the discovery taken by ABC in the State Court action, and was informed that the deposition of Perez had been taken under a stipulation that it could be employed in both the Federal Court and State Court actions. There was no mention made to the Court of separate

discovery conducted by ABC relative solely to its counterclaims against Ali. There in fact was no such discovery made by either ABC or Ali. On the basis of the foregoing, the Court denied ABC's 41(a)(2) motion without prejudice to later renewal, indicating that it did so because of the possibility that Ali might later be subject to a second suit and because ABC had waited until the day of trial to make the motion. (ABC Appendix at 12-13). Counsel for ABC renewed the motion at the close of all the evidence and the Court reserved decision. (Appendix at 545). Then, after the jury rendered its verdict, the Court in effect denied the motion by dismissing the two ABC counterclaims for failure of proof. (Appendix at 674). During the trial, ABC could not and did not present any evidence in support of its two counterclaims.

FED. R. CIV. P. 41(a)(2) allows the court, at the instance of the plaintiff, to dismiss an action without prejudice after service of the answer. Prior to service of the answer, a plaintiff may voluntarily dismiss an action without order of the court pursuant to subsection (a)(1). Subsection (c) applies the rule to the voluntary dismissal of counterclaims. Dismissal pursuant to the Rule is in the discretion of the court. Alamance Industries, Inc. v. Filene's, 291

F.2d 142, 146-47 (1st Cir.), cert. denied, 368 U.S. 831 (1961).

The purpose of the Rule is to prevent dismissals which unfairly affect the other side. Alamance Industries, supra, 291 F.2d, at 146. Such prejudice must be more than that the moving party had brought the suit and the other side had been obliged to retain counsel since these are ". . . the very circumstances that call the rule into play". Alamance Industries, supra, 291 F.2d, at 147. Likewise, the filing of a response to the suit is insufficient. Myers v. Mutual Life Ins. Co., 12 F.R.D. 447 (W.D. Mo. 1952).

In fact, ". . . dismissal should be allowed unless the [opposing party] will suffer some plain legal prejudice other than the mere prospect of a second law suit". Durham v. Florida East Coast Railway Company, 385 F.2d 366, 368-69 (5th Cir. 1967) (emphasis in original). In accord, Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 217 (1947); Gammino Construction Company v. Great American Insurance Company, 52 F.R.D. 323, 325 (D.R.I. 1971); Westinghouse Electric Corp. v. United Electrical Radio and Machine Workers, 194 F.2d 770 (3rd Cir.), cert denied, 343 U.S. 966 (1952).

In Durham, supra, the court below had denied plaintiff's motion on the day of trial to amend the complaint

allowing recovery for negligence without regard to contributory negligence, had then refused plaintiff's Rule 41(a)(2) motion and dismissed the action with prejudice when plaintiff did not proceed with the trial. The record disclosed that the defendant would have suffered no prejudice from the granting of the Rule 41(a)(2) motion other than the annoyance of a second lawsuit on the same subject matter. The Fifth Circuit Court of Appeals reversed. It noted that while the plaintiff's counsel may have been negligent in waiting until trial to make the motions, there was no evidence of his bad faith, and furthermore ". . . '[t]he sanction of dismissal [for failure to prosecute] is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion.'" 385 F.2d, at 368. (emphasis in original).

The factors to be considered in deciding whether the other side would suffer "plain legal prejudice" from a voluntary dismissal were named in Harvey Aluminum v. American Cyanamid Co., 15 F.R.D. 14, 18 (S.D.N.Y. 1953):

> Undue vexatiousness, undue burden to a litigant in presenting his defense or claim in another jurisdiction, excessive and duplicatious expense of a second litigation, the extent to which any judgment in the new action would be conclusive as to issues and parties as contrasted to a final determination in the pending suit, the extent to which

> the current suit has progressed, are some of the factors to be considered in deciding whether prejudice will result to the opposing party.

In Harvey Aluminum, supra, the court denied the Rule 41(a)(2) motion because it would have involved a new trial in British Guinea, where one of the parties defendant was not amenable to process, one of the parties plaintiff would not be present and where only two of the leases in dispute would be dealt with, travel there by all concerned including 21 witnesses, and other circumstances amounting to enormous prejudice to the opposing party. 15 F.R.D., at 19.

The court, in ruling on a motion under FED. R. CIV. P. 41(a)(2) must consider all of the facts, and weigh all of the equities, including the equities of the moving party. Lunn v. United Aircraft Corporation, 26 F.R.D. 12, 18 (D.Del. 1960). Among the equities of the moving party to be considered is that he cannot make out his claim because of a technical failure of proof: "Rule 41(a)(2), Federal Rules of Civil Procedure, has been interpreted as authorizing a plaintiff to dismiss his action 'without prejudice where the court believes that although there is a technical failure of proof, there is nevertheless a meritorious claim.' Report of Proposed Amendments to Rules of Civil Procedure (1946) 64 . . . "

Cone, supra, 330 U.S., at 217 n.5. See Myers, supra, (allow dismissal of plaintiff's action without prejudice, since at time action brought plaintiff misconceived the facts); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2364, at 167 (1971) ("Dismissal has been allowed to give plaintiff an opportunity to secure new evidence after he has found, by discovery or otherwise, that he cannot prove his present claim.") See also Thomas v. Amerada Hess Corporation, 393 F.Supp. 58, 70 (M.D. Pa. 1975) (a factor to be considered is the moving party's explanation for the need to take a dismissal).

Ali did not urge that his prejudice was other than the possibility of a new action, in New York, brought by ABC. (ABC Appendix at 4-5). This is clearly an insufficient reason for the Court's denial of the Rule 41(a)(2) motion. Durham, supra; Cone, supra; Gammino Construction Company, supra; Westinghouse Electric Corp., supra. Equally insufficient is the fact that he had to reply to the counterclaims. Alamance Industries, supra; Myers, supra. The Court below was not shown that Ali had to engage in any other pre-trial activity relative solely to the ABC counterclaims. Of course, it was Ali who brought third-party defendants into the Federal Court action. Ali did engage in extensive discovery and pre-

paration prior to trial, but there was no showing made to the Court below that any of that discovery or preparation was devoted to the defense of the counterclaims of ABC rather than to the defense of the Perez claim and the prosecution of the Ali claims against Perez and the third-party defendants.

On the other hand, the prejudice resulting to ABC from denial of the motion was extreme: dismissal with prejudice of claims which could not be proved at the time claims which were clearly prima facie meritorious, asserted in good faith and based on the outcome of an as-yet untried action. Durham, supra. Furthermore, the failure of ABC to make the Rule 41(a)(2) motion prior to the first day of trial is insufficient reason for the denial of the motion since such delay was not in bad faith and no other party was thereby prejudiced. In light of the foregoing, it is submitted that the Court below failed to exercise its discretion by not giving sufficient reasons for its denial of the Rule 41(a)(2) motion, and abused its discretion denying the motion for the reasons upon which it seemed to rely.

CONCLUSION

The order of the District Court dismissing the third-

party claims of Ali should be affirmed, with costs, and the order of the District Court dismissing the two counter-claims of ABC should be reversed, with costs.

Respectfully submitted,

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CARLETON G. ELDRIDGE, JR.
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Of Counsel

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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ANTHONY PEREZ, JR.,

Plaintiff,

-against- : 75 Civ. 1824

MUHAMMED ALI, a/k/a CASSIUS CLAY,

Defendant and Third-Party Plaintiff,

-against-

AMERICAN BROADCASTING COMPANIES, INC. and ABC SPORTS, INC.

Third-party Defendants.

----------x

BEFORE:

HON. MILTON POLLACK,

District Judge

New York, New York
October 12, 1976 - 10:00 a.m.

APPEARANCES:

HARRY H. LIPSIG, P.C.
Attorney for the Plaintiff,
BY: ROBERT G. SULLIVAN, ESQ.,
Of Counsel.

FREEMAN, MEADE, WASSERMAN, SHARFMAN & SCHNEIDER, ESQS.,
Attorneys for Defendant and Third-Party Plaintiff,

APPEARANCES (Continued):

BY: RICHARD SHARFMAN, ESQ.,
JAMES SHANMAN, ESQ.,
BOBBE BROWN, ESQ.,
Of Counsel.

COUDERT BROTHERS,
Attorneys for Third-Party Defendants,
BY: CARLETON G. ELDRIDGE, ESQ.,
DAVID B. WOLF, ESQ.,
Of Counsel.

- - -

THE COURT: I have been told that somebody has a motion?

MR. ELDRIDGE: Yes, sir. The third-party defendant plaintiff American Broadcasting Companies, Inc. would like to move to have the counterclaim the, ABC, has against Ali in the third party action dismissed under 41-A without prejudice on the ground that that counterclaim is solely predicated upon the result of the companion state court action, Perez against ABC now pending and yet untried in the New York County Supreme Court.

It is an identical claim in defamation to the claim that it made here by Perez.

However, for reasons best known to plaintiff, he sued ABC in the state court and sued Ali in this court. In view of the fact that the case in the state

court has not been adjudicated and the claim for indemnity and/or contribution as a result of an adverse result to ABC in that case could not be tried in this court, since the result of the state court proceeding is as yet unknown, therefore it would be impossible to prove a claim over, and it would seem to me a simple interest in fairness and justice that the matter should be dismissed without prejudice under Rule 41(a).

THE COURT: In other words, your counterclaim against Ali.

MR. ELDRIDGE: There is here pending the defamation action of Perez against Ali --

THE COURT: You will make it very simple for me if you don't give me history. By whom is the claim asserted against whom?

MR. ELDRIDGE: ABC, Inc., American Broadcasting Companies, Inc., against Ali.

THE COURT: You want to discontinue that counterclaim without prejudice?

MR. ELDRIDGE: Yes, sir.

THE COURT: Is there any objection?

MR. SHARFMAN: Yes, sir.

THE COURT: Who do you represent?

MR. SHARFMAN: Ali.

Your Honor, our position is that the counterclaim by ABC against Mr. Ali in this action should be decided in this case. This is the day to reach the issues as to indemnification and contribution between ABC and Ali. Ali has asserted claims against ABC and ABC Sports in this action for indemnification and contribution, and I believe that it is in the interest of the comety of justice that all disputes between ABC Sports, ABC and Ali regarding the statements that are complained of by the plaintiff Perez in this action and in their action in the state court be resolved here.

THE COURT: I don't understand what you have said. Nobody has asked you to discontinue Ali's claim against ABC. ABC wants to withdraw its claim against Ali.

MR. SHARFMAN: We, of course, have no objection to their withdrawing their claims against Ali with prejudice, your Honor, but at this stage --

THE COURT: What is the prejudice?

MR. SHARFMAN: The prejudice is that Ali may possibly be put to the expense and bother of another trial involving the same matters that are being litigated before your Honor here. ABC wants the right, as I understand it, to commence their indemnification and contribution claim all over again after they finish up in the state

ew.

court with the Plaintiff's claim against them down there. It doesn't seem to me to be appropriate to allow them, at this stage, to do so.

THE COURT: In effect, what they are saying is that they are not ready to prove damages, if any, all because the state court case has not been resolved; isn't that what you are saying?

MR. ELDRIDGE: That's correct, sir. It would be a physical impossibility if we tried the state court case and proceeded with this. Obviously, we could continue with it, but it is impossible to proceed with the claim that is predicated solely upon the outcome of the state court action in this case.

THE COURT: Has somebody got a set of marked pleadings?

MR. SULLIVAN: I do, your Honor, it's outside.

THE COURT: What legal activity has there been in this federal court case pertaining to the counterclaim of ABC against Ali?

MR. SHARFMAN: There have been depositions --

THE COURT: Mr.Eldridge?

MR. SHARFMAN: I am sorry, your Honor.

MR. ELDRIDGE: I would say, your Honor, that the parties, in taking depositions, to the extent possible,

tried to take them in connection with both cases rather than having separate discovery in each case in terms of a specific witness such as Ali or an ABC witness, or plaintiff.

THE COURT: Presumably, then you prepared yourself by way of discovery on the issues in the state court case, isn't that so?

MR. ELDRIDGE: I would be, in effect, preparing myself to meet the third party plaintiff Ali's claim over against ABC and ABC Sports. That would be why I would be involved in all of the discovery relating to the Perez-Ali case.

We were brought in --

THE COURT: You said a moment ago that ABC conducted discovery proceedings directed to the claim of Perez against ABC pending in the state court?

MR. ELDRIDGE: I said Perez --

THE COURT: -- because it would have been identical to have two sets of discovery, but nonetheless, you took the discovery in the federal court presumably to prepare your case both in the federal court and in the state court, isn't that so?

MR. ELDRIDGE: Your Honor, when I took discovery in the federal court, I was taking it to defend

against Ali's third party claim against ABC and ABC Sports.

THE COURT: That is not what you said a moment ago.

MR. ELDRIDGE: When you took discovery, we called the state court discovery, when I took discovery in the state court of Tony Perez.

THE COURT: Did you have separate discovery in the state court?

MR. ELDRIDGE: I had a separate deposition of Perez that followed the deposition of Perez by Defendant Ali.

THE COURT: Was that recorded in the federal court proceeding?

MR. ELDRIDGE: Is it recorded? I would say that it was agreed that it could be used in either case, yes, sir.

THE COURT: Have you got a transcript of that?

MR. SULLIVAN: I do, your Honor.

THE COURT: While that's being looked for, is there any other activity in the federal court proceeding which was directed at ascertaining the scope of the Perez claim against ABC that you can think of?

MR. SHARFMAN: Yes, sir.

THE COURT: What?

MR. SHARFMAN: I don't believe it is possible to separate out the discovery taken by ABC, the depositions that ABC took.

THE COURT: Were the same taken by ABC in the federal proceedings?

MR. SHARFMAN: Yes, a separate examination of Perez was conducted by ABC.

MR. ELDRIDGE: As a third party defendant. And I believe that I asked the plaintiff's attorney for Mr. Perez so that we save time, that we could use the deposition in the state court as well so that I would not be bothering him twice since they were both pending actions, or both pending actions.

THE COURT: I have before me the notice signed by the lawyers for ABC to take the deposition in the federal court proceedings of the plaintiff, Anthony Perez --

MR. ELDRIDGE: -- as a third party defendant.

THE COURT: Does Perez make any claim under Rule 14 against ABC in the federal case?

MR. SULLIVAN: No, sir.

THE COURT: It seems to me that unless everything is disposed of in oen litigation, you are running around in a circule, and will have to try the same questions in the litigation between ABC and Ali twice, since they both

stem from a common nucleus of operative fact. If ABC can successfully defend against the claim of Ali against ABC pending in this court, it would be not only for the reason that ABC merely repeated a taped interview of Ali, but that there was no malice, and if there was no malice of ABC Broadcast, that would be applicable as against Perez also.

Since both parties to this litigation, both individual parties to this litigation are, by stipulation, public figures, the issue gets down to whether or not any one of the three parties acted with malice, that is with knowledge and a specific intent to injur somebody or with recklessness as properly defined so as to constitute malice. The issues to be decided in this case necessarily would be dispositive of the central issue that I have mentioned. For that reason, it would be bifurcating a single issue to have two trials concerning it.

The fact that Perez has not taken advantage of his right and doesn't pursue his right to assert a claim against ABC in this litigation may, in the end, result in foreclosing him when again litigating the same subject. Because he has the burden of showing that there is a publication with malice, and unless he confines his claim in their litigation solely against Ali for

having expressed himself, as I understand it, in an interview with an ABC representative and now because of the ABC broadcast, he can't try the case twice either as I see it.

MR. ELDRIDGE: Your Honor, may I make one comment on that. I appreciate all of the things that you have said.

THE COURT: Is there anything wrong in anything I have said, in the analysis of it? How can Perez conceivably recover against Ali for a broadcast that ABC made without proving a case of libel against ABC meaning malice of ABC or recklessness.

MR. ELDRIDGE: Perez would have to prove an independent case, that is a state court case.

THE COURT: I am talking about right here.

MR. ELDRIDGE: In this case he makes no claim here, so I assume he will not attempt to make such a proof. I assume third party plaintiff may.

THE COURT: That means that American Broadcasting Companies and Ali may both be dismissed. He is in the unenviable position of relying on the broadcast of ABC for recovery here. If he doesn't prove that, and prove that that broadcast was done with malice or recklessness, he may be up a tree.

MR. SHARFMAN: And, of course, no such claim has been made, your Honor?

MR. ELDRIDGE: Your Honor, his claim against Ali is based upon the broadcast publication, so he may prove his case against Ali, if he has a case.

THE COURT: Ali didn't make the broadcast, ABC made the broadcast. Ali did not appear on the broadcast, as far as I read these papers. Maybe I have misread them.

MR. ELDRIDGE: Ali was interviewed on the broadcast.

THE COURT: I understand Ali was interviewed several days before the broadcast, and the broadcast tape then became the independent act of ABC.

MR. ELDRIDGE: That is correct, sir.

THE COURT: It had a tape. Now, as I said before, unless it is assumed that by having a conversation with whoever the broadcaster was -- was that Cosell?

MR. ELDRIDGE: Mr. Cosell, yes.

THE COURT: Unless it is claimed that the conversation with Cosell was itself the only publication in suit, if Perez doesn't prove that ABC had no privilege, Perez makes out no case against either defendant, because he is relying on the broadcast. He is not relying on the

conversation with Cosell; isn't that right?

MR. SHARFMAN: That is precisely right, and the pretrial order stipulated that --

THE COURT: I didn't read the pretrial order, but I have had some far distant exposure to libel cases. I know you cite three cases in which I was the lawyer.

MR. ELDRIDGE: My basic point, sir, is that assuming the counterclaim of third party defendant /plaintiff ABC were in the case, in view of the fact that it is predicated solely upon the outcome of the state court case, the liability issue conceivably could be litigated in this court.

However, because the case has not proceeded to a conclusion, it would be impossible for ABC to prove any damage in this case. Therefore, if your Honor proceeded to keep that in this court, it would seem to me that it would remain as a pending matter until such time as the state court case were tried, unless liability was adjudicated in favor of Ali and ABC and was dismissed in the third party claim.

THE COURT: With full knowledge of the consequences you proceeded right down until the day of trial our counterclaim, and now the counterclaim defendant, Ali, says that he would be prejudiced by your abandonment of

this claim because he has prepared himself on that issue. The fact that you can't prove a case that you started out to assert is a concern of yours rather than Ali's.

I will deny the motion without prejudice to renewal as the case developes further.

It seems to me that I would be breaking the case up into littleparts that would be unfair in view of the fact that you have litigated right down until the day of trial and the moment of the selection of the jury the very claim that you now wish to withdraw without prejudice.

This is a late moment to do that.

MR. SHARFMAN: Your Honor, would this be an appropriate time for me to move to dismiss the plaintiff's claims against Defendant Ali based upon the pretrial order, in your Honor's reasoning, in your analysis?

THE COURT: No, this is not an appropriate time, and your motion is denied without prejudice.

MR. SHARFMAN: Thank you, sir.

THE COURT: I say without prejudice because I don't want the implications of the denial to carry any suggestion that I am making a legal ruling, other than the ruling that we are now about to select the jury, and these impromptu motions thrown at the Court at this point don't sit very well with me.

Anything else?

MR. SULLIVAN: Yes, your Honor. Since we are about to pick a jury, I imagine this would be the appropriate time to ask for a fourth challenge.

THE COURT: A fourth challenge?

MR. SULLIVAN: Yes, your Honor.

THE COURT: You mean in the selection of the jury?

MR. SULLIVAN: Yes, your Honor.

THE COURT: Any objection to that.

MR. SHARFMAN: Yes, sir.

MR. ELDRIDGE: I represent two defendants, one is a wholly owned subsidiary of ABC --

THE COURT: Each of you have three. Well, there is a jury here -- it will be a jury of six. The only requirement is two challenges in a jury of six, not three. Three, by common consent among the judges, is a gift rather than a right. I think we will just stand on the usual number.

Anything else?

MR. ELDRIDGE: -- will be two for each side or three?

THE COURT: Three.

That is the limit of the usual arrangement.

MR. SULLIVAN: Your Honor, I would ask in view of your Honor's ruling that if the rule is two, if I can't have a fourth --

THE COURT: I didn't say two, I said three.

MR. SULLIVAN: What I understood from your Honor is three as courtesy and sort of a gift from the Court, but that the rule -- since it is a jury of six -- should properly be two a piece. In view of that, I would ask that if I can't have the fourth, that we abide by the two a piece theory.

THE COURT: Three, please.

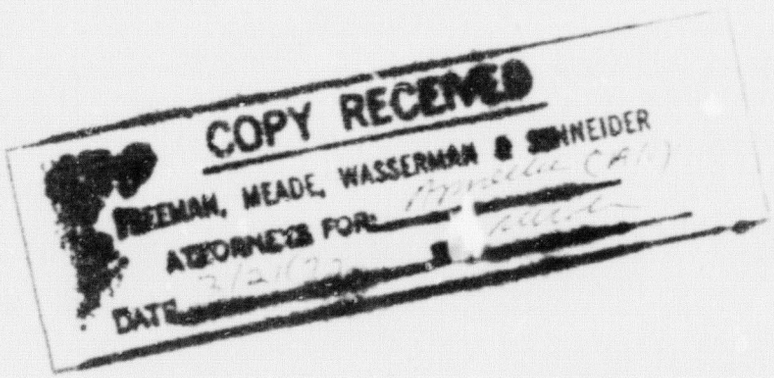
MR. SULLIVAN: Thank you, your Honor.

MR. SHARFMAN: Might I object to certain proposed voir dire questions submitted by the plaintiff?

THE COURT: I have my own voir dire motions. Would you tell me which item you object to? I will tell you whether I was going to use it, in any event.

Let me just get my copy out.

(Discussion off the record.)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